

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

RECEIVED  
REGIONAL HEARING

IN RE: TAMMS INDUSTRIES, INC. )  
 )  
 )  
KIRKLAND, ILLINOIS, )  
 )  
Respondent. )

Docket No.

~~CAV-05-~~ 2002-0019

CONSENT AGREEMENT  
AND FINAL ORDER

02 SEP 30 A9:19

US ENVIRONMENTAL  
PROTECTION AGENCY  
REGION V

**I. Jurisdictional Allegations**

1. This is an administrative proceeding issued under the authority of the Administrator of the United States Environmental Protection Agency ("U.S. EPA") pursuant to Section 113(d) of the Clean Air Act ("the CAA"), 42 U.S.C. § 7413(d) and 40 C.F.R. Part 22, the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits."

2. The Complainant is, by lawful delegation, the Director of the Air and Radiation Division, United States Environmental Protection Agency, Region 5.

3. The Respondent is Tamms Industries, Inc. ("Respondent" or "Tamms"), a Delaware corporation, doing business as a foreign corporation in Illinois.

4. The parties have agreed to a settlement of the matter in controversy through the entry of this Consent Agreement and Final Order ("CAFO"). 40 C.F.R. § 22.18(b) and (c).

5. This CAFO simultaneously commences and concludes the administrative proceeding, as allowed by Section 22.13(b) of the

Consolidated Rules, 40 C.F.R. § 22.13(b), in which Complainant seeks penalties from Respondent for alleged unlawful acts pursuant to Section 183(e) of the CAA, 42 U.S.C. § 7511b and the implementing regulations set forth at 40 C.F.R. Part 59, Subpart D, as described below.

## **II. Statutory and Regulatory Background**

6. Section 183 of the CAA, 42 U.S.C. § 7511b, authorizes U.S. EPA to promulgate national volatile organic compound ("VOC") emissions standards for architectural coatings with the potential to contribute to ozone levels that violate the national ambient air quality standards ("NAAQS") for ozone

7. Section 183(e)(6) of the CAA states, "[a]ny regulation established under this subsection shall be treated, for purposes of enforcement of this chapter, as a standard under section 7411 of this title and any violation of such regulation shall be treated as a violation of a requirement of section 7411(e) of this title."

8. On September 11, 1998, the Administrator of U.S. EPA promulgated national regulations under Section 183(e) of the Act, 42 U.S.C. § 7511b(e). 63 Fed. Reg. 48848. These regulations are codified at 40 C.F.R. Part 59, Subpart D (40 C.F.R. §§ 59.400 through 59.413, and Appendix A).

9. 40 C.F.R. § 59.402(a) requires that, except as provided in 40 C.F.R. §§ 59.403 and 59.404, each manufacturer and importer of any architectural coating subject to Subpart D shall ensure that

the VOC content of the coating does not exceed the applicable limit set forth in table 1 of Subpart D.

10. 40 C.F.R. § 59.403(a) and (d) permit manufacturers and importers of architectural coatings to exceed the applicable VOC content limit provided that the manufacturer or importer pays an annual exceedance fee to EPA by March 1 following the calendar year in which the coatings are manufactured or imported.

11. 40 C.F.R. § 59.404(a) authorizes a manufacturer or importer of architectural coatings to designate a limited quantity of coatings to be exempt from both the VOC content limits and the exceedance fee requirement, provided that the manufacturer or importer complies with:

- (1) The container labeling requirements of Section 59.405;
  - (2) The recordkeeping requirements of Section 59.407(c);
  - (3) The reporting requirements of Section 59.408(b) and (e);
- and

(4) the total amount of VOC contained in all coatings selected for exemption must be equal to or less than 23 megagrams (25 tons) for the period of time from September 13, 1999 through December 31, 2000, 18 megagrams (10 tons) in the year 2001; and 9 megagrams (10 tons) per year in the year 2002 and each subsequent year.

12. 40 C.F.R. § 59.402(b) further provides that:

Except as provided in paragraph (c) of this section, if anywhere on the container of any architectural coating, or any label or sticker affixed to the container, or in any sales, advertising or technical literature supplied by the manufacturer or importer or anyone acting on their behalf, any representation is made that indicates that the coating meets the definition of more than one of the coating categories listed in table 1 of this subpart, then the most restrictive VOC content limit shall apply.

13. 40 C.F.R. § 59.401 defines "*Architectural coating*" as "a coating recommended for field application to stationary structures and their appurtenances, to portable buildings, to pavements, or to curbs. This definition excludes adhesives and coatings recommended by the manufacturer or importer solely for shop applications or solely for application to non-stationary structures, such as airplanes, ships, boats, and railcars."

14. 40 C.F.R. § 59.401 defines "*Primer*" as "a coating formulated and recommended for application to a substrate to provide a firm bond between the substrate and subsequent coatings."

15. 40 C.F.R. § 59.401 defines "*Undercoater*" as "a coating formulated and recommended to provide a smooth surface for subsequent coatings."

16. 40 C.F.R. § 59.401 defines "*Waterproofing sealer and treatment*" as a coating formulated and recommended for application to a porous substrate for the primary purpose of preventing the penetration of water.

17. 40 C.F.R. § 59.401 defines "*Industrial maintenance coating*" as a high performance architectural coating, including primers, sealers, undercoaters, intermediate coats, and topcoats formulated and recommended for application to substrates exposed to one or more of the following extreme environmental conditions in an industrial, commercial or institutional setting:

- (1) Immersion in water, wastewater, or chemical solutions (aqueous and nonaqueous solutions) or chronic exposure of interior surfaces to moisture condensation;
- (2) Acute or chronic exposure to corrosive, caustic, or acidic agents, or to chemicals, chemical fumes, or chemical mixtures or solutions;
- (3) Repeated exposure to temperatures above 120° C (250° F);
- (4) Repeated (frequent) heavy abrasion, including mechanical wear and repeated (frequent) scrubbing with industrial solvents, cleansers, or scouring agents; or
- (5) Exterior exposure of metal structures or structural components.

18. The Administrator of U.S. EPA ("the Administrator") may assess a civil penalty of up to \$27,500 per day of violation up to a total of \$220,000 for violations of 40 C.F.R. Part 59 that occurred on or after January 31, 1997, under Section 113(d)(1) of the Act, 42 U.S.C. § 7413(d)(1), and 40 C.F.R. Part 19.

19. Under Section 113(d)(1), the Administrator may pursue an action for matters where the first alleged date of violation occurred more than 12 months prior to initiating the administrative action, where the Administrator and the Attorney General of the United States jointly determine that a matter involving a longer period of violation is appropriate for an administrative penalty action.

20. The Administrator and the Attorney General of the United States, each through their respective delegates, have jointly determined that an administrative penalty action is appropriate for the period of violations alleged in this complaint.

#### **General Allegations**

21. Tamms is the owner and operator of Tamms Industries, Inc. located at 3835 State Road 72, in Kirkland, Illinois.

22. Tamms manufactures and distributes Dural 333, a two-component, epoxy-based coating.

23. The main intended use of Dural 333 is for field application to concrete surfaces of bridges and dividers.

24. Dural 333 is applied to both stationary structures and pavements, thus qualifying it as an "architectural coating" subject to the provisions of 40 C.F.R. Part 59, Subpart D.

25. Tamms also manufactures and distributes Dural 1004, a two-component, solvent-based coating.

26. Dural 1004 is an "industrial maintenance coating" as defined in 40 C.F.R. § 59.401, when manufactured for use in extreme environmental conditions, including repeated heavy abrasion.

27. Neither Dural 333 nor Dural 1004 is a low-volume coating subject to the tonnage exemption at 40 C.F.R. § 59.403.

#### **IV. Violations**

##### **Count I-Dural 333 VOC Exceedance**

28. Complainant incorporates paragraphs 1 through 27 of this Complaint into paragraph 28, as if set forth fully within.

29. Tamms' technical data sheet for Dural 333 states "Dural 333 is a solvent based epoxy penetrating sealer, for concrete and masonry surfaces. It fills the surface pores thereby lowering the absorption of water and salts."

30. Tamms identified Dural 333 as a "waterproofing sealer and treatment."

31. Tamms' technical data sheet for Dural 1004 states in pertinent part, "Dural 1004 should not be applied directly to concrete. Dural 304 LV (two-part solvent based epoxy) or **Dural 333** (two part epoxy sealer) may be used to **prime** concrete...". (emphasis added).

32. Thus, Tamms has represented that the intended use of Dural 333 is as a "primer and undercoater," when Dural 333 is used in conjunction with Dural 1004.

33. Accordingly, Tamms has represented that Dural 333 meets the definition of both a "primer" and a "waterproofing sealer and treatment."

34. Because Tamms represented that Dural 333 met the definition of more than one of the coating categories listed in Table 1 of 40 C.F.R. Part 59, Subpart D, Dural 333 must comply with the most restrictive applicable VOC content limit, pursuant to 40 C.F.R. § 59.402(b).

35. The VOC limit for "primers and undercoaters," is 350 grams per liter. See 40 C.F.R. Part 59, Subpart D, table 1.

36. Under 40 C.F.R. § 59.402(a), a "waterproofing sealer and treatment" has a VOC limit of 600 grams per liter.

37. The technical data sheet for Dural 333 shows that Dural 333 has a maximum VOC content of 558 grams per liter.

38. Tamms violated 40 C.F.R. § 59.402(b) and Section 111 of the CAA, 42 U.S.C. § 7411, for the period between September 13, 1999, and December 31, 2000, because Dural 333 failed to comply with the more restrictive VOC limit for "primers and undercoaters" of 350 grams per liter.

39. Tamms did not timely pay an annual exceedance fee as permitted under 40 C.F.R. § 59.403 for the time period of September 13, 1999 through December 31, 2000, when it manufactured Dural 333 that exceeded the applicable VOC limit of 350 grams per liter.



40. The total amount of VOC contained in the coatings manufactured by Tamms between September 13, 1999 and December 31, 2000 exceeded 25 tons. Thus, Tamms was not eligible for an exemption under 40 C.F.R. § 59.404.

41. On November 13, 2000, U.S. EPA issued a Finding of Violation to Tamms for violations of 40 C.F.R. Part 59, Subpart D.

42. On December 6, 2000, U.S. EPA and Tamms held a conference to discuss the November 13, 2000 notice of violation.

**Count II-Dural 1004**

43. Complainant incorporates paragraphs 1 through 42 of this Complaint into paragraph 43, as if set forth fully within.

44. Tamms' technical data sheet for Dural 1004 states in pertinent part, "Dural 1004 is a two component, solvent based, aliphatic polyurethane, waterproofing sealer which offers outstanding abrasion resistance... and weather resistant characteristics."

45. The technical data sheet for Dural 1004 also states: "Dural 1004 is a premium performance waterproofing sealer used on airport hangar floors and on walls and floors in manufacturing plants, warehouses, bridge decks and support piers. The cleanability and good chemical resistance make it effective in clean rooms, laboratories..." (Emphasis added).

46. By making these claims in its technical literature, Tamms has represented that Dural 1004 meets the definition of both an "industrial maintenance coating" and a "waterproofing sealer and treatment" as defined in 40 C.F.R. § 59.401.

47. Because Tamms represented that Dural 1004 met the definition of more than one of the coating categories listed in Table 1 of 40 C.F.R. Part 59, Subpart D, Dural 1004 must comply with the most restrictive applicable VOC content limit, pursuant to 40 C.F.R. § 59.402(b).

48. Under 40 C.F.R. § 59.402(a), a "waterproofing sealer and treatment" has a VOC limit of 600 grams per liter.

49. The VOC limit for "industrial maintenance coating" is 450 grams per liter. See 40 C.F.R. Part 59, Subpart D, table 1.

50. 40 C.F.R. § 59.402(b) mandates that Dural 1004 should have had a maximum VOC content less than 450 grams per liter.

51. The technical data sheets for Dural 1004 show that it has a maximum VOC content of 492 grams per liter.

52. Tamms violated 40 C.F.R. § 59.402(b) and Section 111 of the CAA, 42 U.S.C. § 7411, for the period between September 13, 1999, and December 31, 2000, because Dural 1004 failed to comply with the more restrictive VOC limit for "industrial maintenance coating" of 450 grams per liter.

53. Tamms did not timely pay an annual exceedance fee as permitted under 40 C.F.R. § 59.403 for the time period of September

13, 1999 through December 31, 2000, when it manufactured Dural 1004 that exceeded the applicable VOC limit of 350 grams per liter.

54. The total amount of VOC contained in the coatings manufactured by Tamms between September 13, 1999 and December 31, 2000 exceeded 25 tons. Therefore, the exemption provided for in 40 C.F.R. § 59.404 does not apply to Tamms.

55. On November 13, 2000, U.S. EPA issued a Finding of Violation to Tamms for violations of 40 C.F.R. Part 59, Subpart D.

56. On December 6, 2000 U.S. EPA and Tamms held a conference to discuss the November 13, 2000 notice of violation.

**Count III-Late Submittal of Initial Report**

57. Complainant incorporates paragraphs 1 through 56 of this Complaint into paragraph 57, as if set forth fully within.

58. 40 C.F.R. § 59.408(b) requires that all sources subject to 40 C.F.R. Part 59, Subpart D submit an initial notification to the applicable U.S. EPA Regional Office by no later than September 13, 1999.

59. The applicable U.S. EPA Regional Office for Tamms is Region V in Chicago, Illinois.

60. Tamms never submitted its initial notification to Region V until July 13, 2000, when it responded to U.S. EPA's June 19, 2000 Information Request.

61. Thus, Tamms did not file its initial notification to Region V, as required under 40 C.F.R. § 59.408(b) for the time period of September 13, 1999 through July 13, 2000.

62. On November 13, 2000, U.S. EPA issued a Finding of Violation to Tamms for violations of 40 C.F.R. Part 59, Subpart D.

63. On December 6, 2000 U.S. EPA and Tamms held a conference to discuss the November 13, 2000 notice of violation.

#### **V. Proposed Civil Penalty**

64. The Administrator must consider the factors specified in Section 113(e) of the CAA when assessing an administrative penalty under Section 113(d). 42 U.S.C. § 7413(e).

65. Section 113(b) of the CAA, 42 U.S.C. § 7413, authorizes U.S. EPA to assess civil penalties of up to \$25,000 per day for each violation of the CAA. For violations occurring after January 31, 1997, U.S. EPA may assess civil penalties of up to \$27,500 per day. Section 113(b) of the CAA, 42 U.S.C. § 7413, Pub. L. 104-134, April 26, 1996 and 61 Fed. Reg. 69360.

66. Complainant evaluated the facts and circumstances of this case with specific reference to U.S. EPA's Clean Air Act Stationary Source Penalty Policy dated October 25, 1991 ("penalty policy"). Enclosed with this complaint is a copy of the penalty policy.

67. Based upon an evaluation of the facts alleged in this CAFO, the factors in Section 113(e) of the CAA, Respondent's cooperation, and good faith efforts to comply, Complainant

determined that the Administrator should assess a mitigated civil penalty against Respondent of \$50,000.

68. Respondent agrees to pay the mitigated civil penalty of \$50,000.

69. Respondent shall pay a civil penalty of \$50,000 within 30 days after the effective date of this CAFO. Payment of the penalty shall be made by certified or cashier's check, payable to "Treasurer, United States of America," and sent to

U.S. Environmental Protection Agency  
P.O. Box 70753  
Chicago, Illinois 60673

Respondent must also send copies of the transmittal letter and check to:

Katherine Keith  
U.S. EPA - Air and Radiation Division  
Enforcement and Compliance Assurance Branch (AE-17J)  
77 West Jackson Boulevard  
Chicago, Illinois 60604-3590

and

John Matson  
Assistant Regional Counsel  
U.S. EPA - Office of Regional Counsel (C-14J)  
77 West Jackson Boulevard  
Chicago, Illinois 60604-3590

**VI. Stipulations and General Provisions**

70. Respondent hereby admits the jurisdictional allegations set forth in this CAFO. 40 C.F.R. § 22.18(b)(1).

71. Respondent neither admits nor denies the factual allegations set forth in this CAFO.

72. Respondent waives any and all rights to a hearing on any issue of fact or law. Respondent also waives any and all rights to file a petition for judicial review of this agreement in the United States Court of Appeals.

73. The parties agree that the terms in this CAFO shall have the same meaning as those contained in the CAA.

74. This CAFO shall apply to and be binding upon Respondent, its officers, directors, servants, employees, agents, successors and assigns, including, but not limited to, subsequent purchasers.

75. Respondent certifies that it has payed all exceedance fees owed to date.

76. Respondent states that it is currently in compliance and agrees to continue to comply with the requirements of Section 183(e) of the CAA, 42 U.S.C. § 7511b and the implementing regulations set forth at 40 C.F.R. Part 59, Subpart D, when manufacturing "architectural coatings."

77. Interest shall accrue on any amount overdue under the terms of this CAFO at the rate established by the Secretary of the Treasury, pursuant to 31 U.S.C. § 3717. A late payment handling

charge of \$15.00 will be imposed after 30 days, with an additional charge of \$15.00 for each subsequent 30-day period over which an unpaid balance remains. In addition, a five percent per annum penalty will be assessed on any principal amount not paid within 90 days of the date that this CAFO is signed by the Regional Administrator.

78. The Respondent shall not deduct any penalty payment made pursuant to the provisions of this CAFO under any local, state or Federal tax law.

79. The Respondent's failure to comply with the provisions of this CAFO shall result in the referral of this matter to the U.S. Department of Justice for collection. The validity, amount and appropriateness of the penalty is not subject to review in a collection proceeding.

80. Complainant and Respondent agree that the terms of this CAFO resolve only the claims arising out of the allegations in this CAFO and that issuance of this Order does not constitute a waiver by U.S. EPA of its remedies, either judicial or administrative, under the CAA, for any other matters. Nor does issuance of or compliance with this Order exempt Respondent from responsibility to comply with all requirements of the CAA, any administrative order or permit issued pursuant thereto, or any other Federal, state or local law or regulation.

81. This CAFO constitutes the entire agreement between the Complainant and the Respondent.

82. The Respondent consents to the issuance of this Order without further notice.


83. This CAFO shall become effective on the date that it is filed with the Regional Hearing Clerk.



Consent Agreement and Final Order  
In the Matter of Tamms, Industries, Inc.  
Kirkland, Illinois

Tamms, Industries, Inc.,  
Respondent

Dated: 9/12/02

By: 

Jeffrey A. Pink  
Vice President of Operations  
Tamms Industries, Inc.

United States Environmental  
Protection Agency, Region 5,  
Complainant

Dated: 9/26/2002

By: 


STEPHEN ROTHBLATT, Acting Director  
Air and Radiation Division  
U.S. Environmental Protection  
Agency, Region 5  
77 West Jackson Boulevard  
Chicago, Illinois

Consent Agreement and Final Order  
In the Matter of Tamms, Industries, Inc.  
Kirkland, Illinois  
Docket No.

**FINAL ORDER**

The foregoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. Respondent is hereby ORDERED to comply with all of the terms of the foregoing Consent Agreement, effective immediately upon filing of this Consent Agreement and Final Order with the Regional Hearing Clerk. This Order disposes of this matter pursuant to Sections 22.18 and 22.31 of the Consolidated Rules, 40 C.F.R. §§ 22.18 and 22.31.

Dated: 9-27-02

  
\_\_\_\_\_  
Thomas V. Skinner  
Regional Administrator  
United States Environmental  
Protection Agency  
Region 5

CAA-05- 2002-0019

In the Matter of Tamms Industries, Inc.  
Docket No.

CAA-05- 2002-0019

RECEIVED  
REGIONAL HEARING

CERTIFICATE OF FILING AND MAILING

I, Betty Williams, do hereby certify that the original of  
the foregoing Consent Agreement and Final Order (CAFO), was hand  
delivered to the Regional Hearing Clerk, Region 5, United States  
Environmental Protection Agency, 77 West Jackson Boulevard,  
Chicago, Illinois 60604; and that correct copies, were mailed  
first-class, postage prepaid, certified mail, return receipt  
requested, to the Respondent's Counsel by placing it in the  
custody of the United States Postal Service addressed as follows:

Jeffrey A. Pink, Vice President  
Tamms Industries, Inc.  
3835 State Route 72  
Kirkland, Illinois 60146

I also certify that a copy of the Consent Agreement and  
Final Order was sent by First Class Mail to:

Julie Armitage, Acting Manager  
Compliance and Enforcement section  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
Springfield, Illinois 62702

on the 30<sup>th</sup> Day of September, 2002

Betty Williams  
Betty Williams, Secretary  
AECAS (IL/IN)

CERTIFIED MAIL RECEIPT NUMBER: 7001 0320 00060178 4681